ABDUL MUTHALIB HASSAN

v.

MAIMOON HJ. ABD. WAHID

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[CIVIL SUIT NO. 24-262 OF 1986]
27 SEPTEMBER 1991

LANDLORD AND TENANT: *Oral monthly tenancy - Termination by landlord - Whether notice to quit was valid - Claim by tenant for return of property detained by landlord - Effect of invalidity of notice to quit - Exclusive possession remains with tenant - Non-payment of rent is no justification for trespass - Mitigation of damages - Whether specific demand made for return of goods on premises - Remedy - Specific Relief Act 1950, s. 9.*

TORT: *Detinue and conversion - Trespass - Damages - Specific Relief Act 1950, s. 9.*

The plaintiff was a tenant of premises owned by the father (now deceased) of the defendant. The tenancy commenced on 20 August 1977 and the plaintiff had been paying rental, initially at RM70 per month, which was subsequently increased until it was RM200 per month from 1984 onwards. When the defendant's father passed away in June 1984, the plaintiff continued to pay the rent to the defendant.

All this while, the plaintiff carried on a restaurant business on the premises. As from June 1985, due to ill-health, the plaintiff did not run the business himself but leased it to AB. However, AB defaulted in his rental payments and the plaintiff terminated this arrangement with AB and took back possession of the premises and the business in December of the same year.

On 20 February 1985, the defendant served on the plaintiff a notice requiring him to vacate the premises within one month on the ground that the plaintiff had rented out the premises to AB without her consent. In January 1986, the premises were closed and padlocked by the defendant. The plaintiff brought this action, claiming the return of all his belongings wrongfully detained by the defendant at the said premises and damages as a result of the defendant's trespass on the premises.

Held:

[1] The plaintiff was a monthly tenant on the basis of the calendar month and accordingly the notice to quit was not a valid notice.

[2] The evidence suggests that it was the defendant who must have locked up the premises. As the plaintiff was legally in possession, the notice to quit being not a valid notice, the defendant's conduct was wrongful.

[3] The plaintiff's action reflects the English law of detinue, possession and conversion. Detinue has been abolished in England but the remedies for conversion are now found in s. 3 of the Torts (Interference with Goods) Act 1977, which is modelled on the common law remedies. In Malaysia, the remedy is contained in s. 9 of the Specific Relief Act 1950.

[4] Under s. 9 of the Act the words "entitled" and "right" are used and they must mean legally "entitled to possession" or "right to possession"; before that legal right can arise, something must first be present. Only when a demand is made will the person in possession be aware or realise the right of possession in the person who makes the demand.

[5] Therefore, an unconditional letter of demand for the return of the goods should have been made for the return of the goods before the writ was filed. On the facts of this case, no unconditional and specific demand was made by the plaintiff for the return of any specific property belonging to him. In the circumstances, there was no cause of action by the plaintiff and therefore the action either in detinue or for conversion must fail.

[6] With regard to the claim for trespass, since the notice to quit was not valid, the plaintiff therefore still had exclusive possession of the premises. As such, the defendant had committed trespass by going on to the premises and locking it up. Non-payment of rent is no justification for trespass, although it may mitigate damages.

[7] The plaintiff can only recover nominal damages. The failure of the defendant to give a valid notice to quit was due to technical error; if the notice had been in order, he could very well have recovered the premises. After the premises had been locked up, the plaintiff had done nothing. If she had taken initiatives to negotiate for a settlement, this case would not have come to Court.

[Plaintiff's claim for detinue and conversion dismissed; plaintiff's claim in trespass allowed with nominal damage.]

Case referred to:
General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd. [1963] 2 All ER 314 ***(cons)***

Legislation referred to:
Specific Relief Act 1950 s. 9.
Torts (Interference with Goods) Act 1977 [UK], s. 3

Other sources referred to:
Clerk & Lindsell on Torts 13 Edn., pp. 636, 645, 646
Winfield & Jolowicz on Tort 12 Edn., p. 501, Roger

For the plaintiff - Bastion P. Vendargon; M/s. Vendargon & partners
For the defendant - Chua Ah Cho; M/s. Sahadin & Co.

JUDGMENT

Lamin Mohd Yunus J:

In this case the plaintiff (PW1) is suing the defendant (DW1) for the return of all his belongings wrongfully detained by the defendant at the business premises No. 52, Batu 8 3/4, Jalan Gambang, Kuantan known as Restoran Haji Wahid. The owner of the premises was one named Hj. Abdul Wahid now deceased, the father of the defendant. According to the plaintiff (PW1), he became the tenant of the said premises by way of an oral agreement with effect from 20 August 1977 for the purpose of carrying on the business of 'Kedai Kopi dan Makanan' (The business was registered on 31 May 1979 - see p. 4). When he started the business the rental was RM70 per month. It was increased to RM100 per month in 1978 and RM150 per month in 1980 and finally in 1984 to RM200 per month. He had been paying the rent to the late Hj. Abdul Wahid until his death in June 1984. Thereafter he continued paying the rent to his daughter, the defendant. The rent was to be paid on the first of every month.

As from 1 June 1985 PW1 was not in good health and so on 10 June 1985 he leased out his business to one Abu Bakar for one year at a monthly rental of RM450. About that time, PW1 stayed in Penang for treatment. The rental of RM450 must have been for both the

business and the premises. However by a notice dated 28 December 1985 (P3), PW1 terminated the said agreement on the grounds that Abu Bakar had defaulted in the payment of rental and committed some other breaches as well. So on 3 January 1986 Abu Bakar surrendered both the business and the premises to PW1.

In the meantime, the defendant (DW1) served PW1 with a written notice dated 20 February 1985 (P6) to vacate the said premises within one month on the ground that PW1 had rented out the premises to Abu Bakar without her consent. On 27 January 1986 the premises were closed and padlocked allegedly done by DW1. Hence the present suit filed by PW1.

Having carefully considered all the evidence before me I agree with the learned Counsel for the plaintiff that the entire case hinges on the question of the validity or otherwise of the notice to quit (P6). I also agree that on the evidence PW1 was a monthly tenant on the basis of the calendar month and accordingly therefore the said notice was not a valid notice.

The next thing for me to decide is who locked the premises. According to PW2 (Mohamad Mydin) it was the defendant (DW1) who locked it. At about 6.30 a.m. on 27 January 1986, the defendant came to the shop and PW2 (PW1's employee) was there alone and was about to open the shop and the defendant told PW2 that she PW1 'ada hal' and so she wanted to lock the shop. She then locked it using her own padlock. DW1 however denied going to the shop on the said date and denied locking it. According to DW1, a day before (that is, 26 January 1986), PW2 informed her that he wanted to leave the premises in the morning the next day and asked her for a lock. She did not know why he wanted to leave. But from her solicitor's letter of 14 June 1986 (see p. 22 of ABD - P13), she categorically denied having 'forcibly and unlawfully locked' the shop. According to the letter Mydin (PW2) left the premises unattended and she had no alternative but to lock the premises. Now, from PW2's version, when DW1 wanted to lock it, he asked her to wait for the return of PW1's son named Abd. Rahim but DW1 refused to listen. So PW2 packed his clothes and waited in the shop next door for the return of Abd. Rahim. According to PW2 Abd. Rahim returned that same evening and informed him of the incident and reported the matter to the police. It is interesting to note that neither Abd. Rahim testified in support nor was the police report produced. In examination-in-chief PW2 said that after that (meaning after informing PW1's son and the lodging of the police report) PW1's son (Abd Rahim) was not allowed into the shop. In cros examination PW2 said that he did not know whether PW1's son had gone to see DW1. Also in cros examination, DW2 said that he did not telephone PW1's son nor PW1 himself that is regarding the incident after he had been locked out. It is amazing that PW2 merely waited from 6.30 a.m. till evening without doing anything about the incident. In examination-in-chief, PW2 was positive that PW1's son was not allowed into the shop suggesting that since the shop had been locked in his absence, he must have made an attempt to see DW1 in order to get into the shop and yet in his cros examination he said that he did not know whether PW1's son had gone to see DW1. On the other hand when DW1 was cross-examined on her solicitor's letter of 14 June 1986, her reply was that she did not know how to answer the question as to why she changed her story. During the whole time PW1, PW2 and DW1 were in the witness stand, I had the suspicion that the whole truth was not before the Court though everyone of them swore to state the whole truth and nothing but the truth. However the sum toto of the evidence suggests that DW1 must have locked the premises and that seems to be the more probable version. The next question is what was the reason for locking the shop. Was it because PW2 had left it unattended or that she locked it after having chased PW2 out of it. One would expect the latter to have taken place and I think so too as there was a ready-made motive for the act. That was wrongful as the plaintiff was still legally in possession, because the notice to quit was not a valid notice.

The first prayer of the plaintiff's claim is for the return of all his belongings wrongfully detained by the defendant. I think the set of facts before me does reflect the English law of detinue, possession and conversion. On detinue if I may quote Clerk & Lindsell on *Torts* 13th Edn., at p. 636 para. 1072:

> The gist of liability in detinue is the wrongful detention of the plaintiff's chattel. The action was available against a defendant who had received the chattel from the plaintiff (for example by bailment) or otherwise against a defendant who withheld the plaintiff's chattel after the plaintiff had demanded its return. The principal object of the action was to recover the value of the chattel so detained.

In the case of *General And Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* [1963] 2 All ER 314 Diplock LJ in the Court of Appeal explained the law of detinue and conversion thus (at p. 317):

> This appeal raises a neat point as to the remedies available to a plaintiff who sues for the wrongful detention of goods. The plaintiffs by a specially indorsed writ claimed the return of a mobile crane index No. OMF 347 or its value and damages for detaining the same. They pleaded their title to the crane and relied on a demand for its delivery up dated 8 May 1961. The prayer included an alternative claim for damages for conversion.
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> There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgement in the action for detinue. It is important to keep this distinction clear, for confusion sometimes arises from the historical derivation of the action of conversion from detinue *sur* bailment and detinue *sur* trover; of which one result is that the same facts may constitute both detinue and conversion. Demand for delivery up of the chattel was an essential requirement of an action in detinue and detinue lay only when at the time of the demand for delivery up of the chattel made by the person entitled to possession the defendant was either in actual possession of it or was estopped from denying that he was still in possession. Thus, if there had been an actual bailment of the chattel by the plaintiff to the defendant the latter was estopped from asserting that he had wrongfully delivered the chattel to a third person or had negligently lost it before demand for delivery up and the plaintiff could sue in detinue notwithstanding that the defendant was not in actual possession of the chattel at the time of the demand (see *Jones v. Dowle; Reeve v. Palmer*). Alternatively the plaintiff could sue in conversion for the actual wrongful delivery of the chattel to the third person, though not for the loss. On the other hand an unqualified refusal to comply with a demand for delivery up of a chattel made by the person entitled to possession may also amount to conversion, but only if the defendant at the time of the refusal was in actual possession of the chattel. If he has wrongfully delivered it to a third person before the date of the demand the prior wrongful delivery constitutes the conversion, not the subsequent refusal to comply with the demand (see *Sachs v. Miklos*). But even where, as in the present case, the chattel is in the actual possession of the defendant at the time of the demand to deliver up possession, so that the plaintiff has alternative causes of action in detinue or conversion based on the refusal to comply with that demand, he has a right to elect which cause of action he will pursue (see *Rosenthal v. Alderton & Sons Ltd.*) and the remedies available to him will differ according to his election.

Clerk and Lindsell on Torts, 13th Edn., at p. 645 para. 1091 states:

> The ordinary way of showing a conversion by unlawful retention of property is to prove that the defendant, having it in his possession, refused to give it up on demand made by the party entitled.

The demand must be unconditional and specific. So also the refusal to return the plaintiff's property must be equally unconditional. Logically therefore the right of action will only be available if the demand is made before the issue of the writ. Clerk and Lindsell on *Torts* at p. 646 (para. 1094) states:

> There can be no right of action unless the demand was brought to the knowledge of the defendant before the issue of the writ.

Detinue has been abolished in England but the remedies for conversion are now found in s. 3 of the Torts (Interference with Goods) Act 1977 which is modelled on the common law remedies available for detinue (see *Winfield and Jolowicz on Tort* by W.V.H. Rogers 12th Edn., p. 501). Section 9 of our Specific Relief Act 1950 (Act 137) states:

> A person entitled to the possession of specific movable property may recover the same in the manner prescribed by the law relating to civil procedure.
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> Explanation 1 - ...
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> Explanation 2 - A special or temporary right to the present possession of property is sufficient to support a suit under this action.

According to explanation 2, a special or temporary right to possession is sufficient to support a suit. But in England before and after 1977 the right to sue will only arise after a proper demand is made. In our s. 9 of Specific Relief Act the words "entitled" and "right" are used and they must mean legally "entitled to possession" or "right to possession" and I think before that legal right can arise, something must first be present. For example if someone is in mere physical possession of some movable object, he may *bona fide* continue to be in possession of it if no one demands the return of it. Only with the demand made, will the person in possession be aware or realise of the right to possession in the person who makes the demand. Once he is aware that another person has a better right to possession, he may decide to return the property forthwith in which case there will be no case against him and no writ need be issued. Similarly therefore in our case an unconditional letter of demand for the return of the goods should also issue before the writ is filed. In the present case before me the plaintiff was back in possession of the premises on 3 January 1986 that is, the day when Abu Bakar returned the premises upon termination of the tenancy by the plaintiff. The plaintiff appointed PW2 to look after the shop with his son as PW2's assistant. On 27 January 1986 the defendant (DW1) locked the premises. Now the question is was any demand made by the plaintiff for the return of any specific things belonging to him assuming that the defendant was then in possession. I find no unconditional and specific demand by the plaintiff for the return of his property. The earliest indication from PW1 after 27 January 1986 which made reference to his own goods in the premises is contained in the letter of the plaintiff's solicitors dated 28 February 1986 (P11). This letter did not demand for the return of his goods. It merely informed the defendant that she would be held liable for "all loss and damage to his goods and property" and that legal proceedings would be instituted against him. So also was the tenor of his plaintiff's solicitor's letter of 31 May 1986 (P12). There was no specific demand for the return of his goods. The response to P12 was the letter from the defendant's solicitor dated 14 June 1986 (P13). Paragraph 3 of this letter is of particular significance and it says:

> Your client is free to take his equipment and articles provided that he pays all arrears of rental amounting to ...

By the above said paragraph, the defendant cannot be said to have refused to return the plaintiff's goods even assuming that there was a demand for their return. I would say that it was a conditional refusal in that the condition was the settlement of all rents in arrears. Again by the plaintiff's solicitor's letter of 7 July 1986 (P14), it was not a demand for the return of the goods locked in the premises. It was merely an intimation of additional claims by adding more items. The letter of 7 July 1986 appears to be the last from the plaintiff's solicitors before the filing of the writ on 28 July 1986.

Upon perusal of the statement of claim, I find no indication of any demand made for delivering up of specific items of belongings unlike in the case of *General Finance v. Cooks Cars*. Neither is there an allegation of an unqualified refusal to comply with the demand for the delivering up of any specific items of belongings.

In the circumstances there was no cause of action by the plaintiff and therefore the action either in detinue or for conversion pertaining to items of plaintiff's belongings must fail.

Next question is whether there is a case for trespass against the premises of which the plaintiff is the tenant. This is a rather unique case of trespass that is, trespass is alleged to have been committed by the owner of the premises herself. The notice to quit served by the defendant, as I have found is not valid, the plaintiff therefore still had exclusive possession of the premises. Trespass can exist even with the slightest or most trifle encroachment on the property. Therefore going on to the premises for non-payment of rent is no justification for trespass. It may mitigate damages.

With regard to damages, I am inclined to give only nominal damages for the following reasons. I am not going into the question of whether or not the defendant is the owner of the premises. The plaintiff has been paying rent to the defendant since the death of her father in June 1984. For the purpose of the present case, the question of ownership is no more an issue. She, the defendant, gave the plaintiff one month's notice to quit the premises by 22 January 1986. Unfortunately, she committed only a technical error as regards the date of the notice and therefore it had to be ruled that it was not valid. She could very well have recovered the premises if the notice had been in order. Then she locked the premises perhaps with the hope that the plaintiff would settle the arrears of rent. Her Counsel said that the plaintiff was free to take his equipment and articles. It would appear that she had no intention to commit trespass if only the plaintiff was prepared to pay the arrears. After the notice to quit had been served on him and the premises locked, the plaintiff did nothing. He could have made an attempt to regain entry and possession of the premises. As regards his goods, he never made any demand for their return and as regards the premises, he never made any offer to settle whatever rental that was truly due. I strongly feel that if the plaintiff had taken initiatives to negotiate for a settlement, this case would not have come to Court. Instead his reply (ABD8) to the notice (P6) to vacate can be said to be quite arrogant. He even questioned the defendant as to the true ownership of the shop. He failed to realise that he had been paying rent to her since her father's death. If he had not adopted such an unwarranted attitude, in all probability there would have been settlement out of Court. Within six months from the date the shop was locked, the writ was filed and the plaintiff just sat back, as if completely unconcerned as to what was going to happen to his own goods in the shop.

As I have found that trespass has been committed by the defendant for locking the shop, to allow damages be awarded on the basic of rental of RM200 per month commencing from the day the shop was locked to the day judgment is obtained is to my mind unconscionable

in view of the attitude of the plaintiff. I would therefore allow only nominal damages based on rental of RM200 per month for six (6) months which in effect is the period calculated from the day the shop was locked to the filing of the writ. That will be RM1,200.

Decision

The plaintiff's claim is allowed and I therefore order that:

a) nominal damages of RM1,200 be paid to the plaintiff for trespass on the premises;

b) the immediate return of the premises to the plaintiff together with his belongings; and

c) costs.

I also find that defendant has not succeeded in her counterclaims and they are therefore dismissed with costs.

Also found at [1992] 1 CLJ 88